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Kerajaan Malaysia v LFL Sdn Bhd and another appeal

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(i)-17–05 OF 2023(W) AND 01(i)-16–05 OF 2023(W)
ABANG ISKANDAR PCA , NALLINI PATHMANATHAN, ZABARIAH YUSOF, RHODZARIAH BUJANG AND HANIPAH FARIKULLAH FCJJ
27 NOVEMBER 2024

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Civil Procedure — Jurisdiction — Immunity of foreign sovereign — Respondent published article in Malaysia on method of execution of death penalty in Singapore — Issuance of correction direction by Government of Singapore — Respondent sought declarations and injunction to prevent enforcement of Singapore's Protection from Online Falsehoods and Manipulation Act 2019 ('the POFMA') in Malaysia — Whether principle of sovereign immunity applied to Singaporean Minister of Home Affairs in his exercise of governmental function — Whether POFMA had extra territorial effect to Malaysian citizen in light of Art 10 of Federal Constitution

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In these two appeals, the Attorney General of Malaysia and the Government of Malaysia were the appellants in Appeal 16 and Appeal 17 respectively and the respondent in both appeals was the Lawyers for Liberty, a Malaysian non-governmental organisation. On 16 January 2020, the respondent published a press statement on their website alleging that the method of execution of the death penalty in Singapore was unlawful and brutal ('LFL press statement'). The Government of Singapore directed the issuance of a correction direction to the respondent under s 11 of the Protection from Online Falsehoods and Manipulation Act 2019 ('the POFMA'), notifying that: (a) the LFL press statement contained false statement of fact; (b) Singapore's Minister of Home Affairs ('the Minister'), in exercise of his statutory powers under POFMA, directed the respondent to insert a correction notice; (c) the respondent could apply to the Minister to vary or cancel the correction direction; and (d) in the event the application was refused, the respondent could appeal to the High Court of Singapore to set aside the correction direction. The respondent did not comply with the correction direction and instead proceeded to file two applications in the High Court, by way of originating summonses ('OS'), namely 'OS 46' and 'OS 51'. In OS 46 against the Government of Malaysia, the respondent sought: (i) a declaration that the respondent had the right to express their opinion in Malaysia with regard to any matters, pursuant to art 10(1)(a) of the Federal Constitution ('FC') ('prayer 1'); (ii) a declaration that the respondent's rights could not be impaired by a law in Singapore, namely the POFMA, which purported to extend beyond Singapore, that was assuming extra-territorial jurisdiction ('prayer 2'); and

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(iii) a declaration that the respondent could not be subjected to any process within Malaysia in furtherance of the Singaporean law ('prayer 3'). In OS 51 against the Minister, the respondent sought: (A) a declaration that the direction could not be enforced against the respondent in Malaysia; (B) a declaration that the Minister could not take any action to enforce any provision of POFMA against the respondent in Malaysia; and (C) an injunction to restrain enforcement of Singapore's laws, in particular the POFMA, within Malaysia against the respondent. Vide an order, the Attorney General of Malaysia was granted leave to intervene in OS 51. The Government of Malaysia, as the defendant in OS 46, and the Attorney General of Malaysia, as the intervener in OS 51, applied to strike out the plaintiff's OS on the grounds that they were scandalous, vexatious and frivolous and otherwise an abuse of the process of court. The striking out applications were allowed by the High Court. Aggrieved, the respondent filed an appeal to the Court of Appeal. The Court of Appeal set aside the decision of the High Court and ordered OS 46 and OS 51 to be remitted back and heard before another High Court judge. Hence, these appeals by the appellants. The primary issues that required consideration were: (1) the application of sovereign immunity to the Minister in his exercise of a governmental function; and (2) the extra territorial effect POFMA had in relation to a Malaysian citizen in light of art 10 of the FC.

Held, allowing Appeal 16 and dismissing Appeal 17:

(1) The sovereign status of the Minister could be evinced from the certificate issued and produced by the Government of Malaysia. The issuance of a certificate from the Government of Malaysia amounted to conclusive evidence of a foreign state's sovereign status, which meant that a foreign state, a head of state, or head of government acting in an official capacity shall enjoy immunity from the jurisdiction of the local courts. Accordingly, no proceedings may be instituted against them by any party (subject to the waiver of immunity and other exceptions). The exceptions under the restricted immunity regime largely encompassed commercial, employment and other such exceptions; exceptions which were plainly inapplicable here. Any adjudicative jurisdiction over the acts of a sovereign nation which included the act of the Minister could not be exercised. Appeal 16 pivoted on these aspects of State or sovereign immunity and therefore ought not be the subject matter of adjudication by the Malaysian Courts. The Court of Appeal erred in failing to address the existence of the certificate certifying Singapore as a sovereign State and in failing to treat State immunity as a threshold issue. Insofar as Appeal 16 and OS 51 was concerned, it was not open to the Malaysian Courts to examine the merits of the suit. Therefore, OS 51 was struck out (see paras 37–40).

(2) While there was no absolute prohibition on states extending the reach of their local laws beyond the borders of their territory, an extra territorial

expansion of a state's prescriptive jurisdiction must first be predicated upon a recognised basis in international law. This in turn involved consideration of whether there was an obviously substantial link with the State seeking to enact laws with extra territorial effects. The question of whether Singapore possessed the necessary jurisdiction to prescribe in this instance involved an evaluation of multiple factors, such that this issue could not be decided summarily for the purposes of striking out. Therefore, OS 46 was ordered to proceed for hearing but only in respect of the relief sought in prayers 1 and 2 as amended to read as follows: 'a declaration as to the extra territorial jurisdiction of POFMA in relation to a Malaysian citizen in Malaysia in light of art 10(1)(a) of the FC.' Prayer 3 was disallowed in that it encroached on State immunity (see paras 56 & 58–60).

[Bahasa Malaysia summary

Dalam dua rayuan ini, Peguam Negara Malaysia dan Kerajaan Malaysia masing-masing adalah perayu dalam Rayuan 16 dan Rayuan 17, manakala responden dalam kedua-dua rayuan adalah Lawyers for Liberty, sebuah pertubuhan bukan kerajaan Malaysia. Pada 16 Januari 2020, responden menerbitkan satu kenyataan di laman web mereka yang mendakwa bahawa kaedah pelaksanaan hukuman mati di Singapura adalah menyalahi undang-undang dan kejam ('kenyataan LFL'). Kerajaan Singapura mengarahkan pengeluaran arahan pembetulan kepada responden di bawah s 11 Akta Perlindungan daripada Kepalsuan dan Manipulasi Dalam Talian ('POFMA'), memaklumkan bahawa: (a) kenyataan LFL mengandungi pernyataan fakta palsu; (b) Menteri Hal Ehwal Dalam Negeri Singapura ('Menteri'), dalam melaksanakan kuasa statutori beliau di bawah POFMA, mengarahkan responden untuk memasukkan notis pembetulan; (c) responden boleh memohon kepada Menteri untuk mengubah atau membatalkan arahan pembetulan; dan (d) sekiranya permohonan itu ditolak, responden boleh merayu kepada Mahkamah Tinggi Singapura untuk mengetepikan arahan pembetulan itu. Responden tidak mematuhi arahan pembetulan dan sebaliknya meneruskan dengan memfailkan dua permohonan di Mahkamah Tinggi, melalui saman pemula ('OS'), iaitu 'OS 46' dan 'OS 51'. Dalam OS 46 terhadap Kerajaan Malaysia, responden memohon: (i) pengisytiharan bahawa responden mempunyai hak untuk menyatakan pendapat mereka di Malaysia berhubung dengan apa-apa perkara, menurut Perkara 10(1)(a) Perlembagaan Persekutuan ('PP') ('permohonan 1'); (ii) pengisytiharan bahawa hak responden tidak boleh terjejas oleh undang-undang di Singapura, iaitu POFMA, yang bertujuan untuk melangkaui Singapura, yang dikatakan bidang kuasa luar wilayah ('permohonan 2'); dan (iii) pengisytiharan bahawa responden tidak boleh tertakluk kepada apa-apa proses di Malaysia bagi memajukan undang-undang Singapura ('permohonan 3'). Dalam OS 51 terhadap Menteri, responden memohon: (A) pengisytiharan bahawa arahan itu tidak boleh dikuatkuasakan terhadap responden di Malaysia;

(B) perisytiharan bahawa Menteri tidak boleh mengambil apa-apa tindakan untuk menguatkuasakan mana-mana peruntukan POFMA terhadap responden di Malaysia; dan (C) injunksi untuk menghalang penguatkuasaan undang-undang Singapura, khususnya POFMA, di Malaysia terhadap responden. Melalui satu perintah, Peguam Negara Malaysia telah diberikan kebenaran untuk campur tangan dalam OS 51. Kerajaan Malaysia, sebagai defendan dalam OS 46, dan Peguam Negara Malaysia, sebagai pencelah dalam OS 51, memohon untuk membatalkan OS plaintif atas alasan bahawa ia adalah mengaibkan, menyusahkan dan remeh dan sebaliknya merupakan penyalahgunaan proses mahkamah. Permohonan pembatalan itu dibenarkan oleh Mahkamah Tinggi. Tidak berpuas hati, responden memfailkan rayuan kepada Mahkamah Rayuan. Mahkamah Rayuan mengetepikan keputusan Mahkamah Tinggi dan mengarahkan OS 46 dan OS 51 dikembalikan dan didengar semula di hadapan hakim Mahkamah Tinggi yang lain. Oleh itu, rayuan ini oleh perayu-perayu. Isu utama yang memerlukan pertimbangan adalah: (1) pemakaian kekebalan berdaulat kepada Menteri dalam melaksanakan fungsi kerajaan beliau; dan (2) kesan luar wilayah POFMA berhubung dengan warganegara Malaysia berdasarkan Perkara 10 PP.

Diputuskan, membenarkan Rayuan 16 dan menolak Rayuan 17:

(1) Status berdaulat Menteri boleh dibuktikan daripada perakuan yang dikeluarkan dan dikemukakan oleh Kerajaan Malaysia. Pengeluaran perakuan daripada Kerajaan Malaysia merupakan bukti konklusif status kedaulatan sesebuah negara asing, yang bermaksud bahawa sesebuah negara asing, ketua negara, atau ketua kerajaan yang bertindak dalam kapasiti rasmi akan menikmati kekebalan daripada bidang kuasa mahkamah tempatan. Oleh itu, tiada prosiding boleh dimulakan terhadap mereka oleh mana-mana pihak (tertakluk kepada penepian kekebalan dan pengecualian lain). Pengecualian di bawah rejim kekebalan terhad sebahagian besarnya meliputi pengecualian komersial, pekerjaan dan lain-lain; pengecualian yang jelas tidak terpakai di sini. Mana-mana bidang kuasa penghakiman ke atas tindakan sesebuah negara berdaulat yang termasuk tindakan Menteri tidak boleh dilaksanakan. Rayuan 16 tertumpu pada aspek-aspek kekebalan negara atau kedaulatan ini dan oleh itu tidak sepatutnya menjadi perkara penghakiman oleh Mahkamah Malaysia. Mahkamah Rayuan telah terkhilaf kerana gagal menangani kewujudan perakuan yang memperakui Singapura sebagai sebuah negara berdaulat dan kerana gagal menganggap kekebalan negara sebagai isu ambang. Setakat mana Rayuan 16 dan OS 51 berkenaan, Mahkamah Malaysia tidak boleh meneliti merit saman itu. Oleh itu, OS 51 dibatalkan (lihat perenggan 37–40).

(2) Walaupun tiada larangan mutlak ke atas negara yang melanjutkan jangkauan undang-undang tempatan mereka melangkaui sempadan wilayah mereka, pengembangan luar wilayah bidang kuasa preskriptif

sesebuah negara mesti terlebih dahulu berasaskan asas yang diiktiraf dalam undang-undang antarabangsa. Ini seterusnya melibatkan pertimbangan sama ada terdapat kaitan yang jelas ketara dengan negara yang cuba menggubal undang-undang dengan kesan luar wilayah. Persoalan sama ada Singapura memiliki bidang kuasa yang diperlukan untuk menetapkan dalam keadaan ini melibatkan penilaian pelbagai faktor, sehingga isu ini tidak dapat diputuskan secara ringkas bagi tujuan pembatalan. Oleh itu, OS 46 diperintahkan untuk diteruskan untuk perbicaraan tetapi hanya berkenaan dengan relif yang dipohon dalam permohonan 1 dan 2 seperti yang dipinda untuk dibaca seperti berikut: 'pengisytiharan tentang bidang kuasa luar wilayah POFMA berhubung dengan warganegara Malaysia di Malaysia berdasarkan perkara 10(1)(a) PP'. Permohonan 3 tidak dibenarkan kerana ia menceroboh kekebalan negara (lihat perenggan 56 & 58–60).]

Cases referred to

Arrest Warrant (Democratic Republic of Congo v Belgium) ICJ Rep 3 (2002) (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening); Janah v Libya (Secretary of State for Foreign and Commonwealth Affairs and others intervening) [2019] AC 777, SC (refd)

Cohen v Beneficial Indus Loan Corp 337 US 541, SC (refd)

Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor [1990] 1 MLJ 475; [1990] 1 CLJ Rep 77, SC (refd)

Democratic Republic of Congo v Belgium 2002 ICJ Rep 25 (refd)

Deutsche Bank AG London Branch v Receivers Appointed by the Court; Central Bank of Venezuela v Governor and Company of the Bank of England and others [2022] 2 WLR 167; [2021] UKSC 57, SC (refd)

Difference Relating to Immunity from Legal Process of a Special Rapporteur of The Commission on Human Rights [1999] ICJ Rep 62 (refd)

Germany v Italy: Greece Intervening, Judgment 2012 ICJ Rep 99 (refd)

Hape v R [2007] SCJ No 26; [2007] 22 BHRC 585, SC (refd)

McElhinney v Ireland (2001) 34 EHRR 323; (2001) 12 BHRC 114 (refd)

NYSA-ILA Pension Trust Fund ex rel Bowers v Garuda Indonesia 7 F3d 35, 39 (2d Cir 1993) (refd)

Regina v Gul (Mohammed) [2014] AC 1260, SC (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)

Subramaniam a/l Letchimanan v The United States of America and another appeal [2021] 5 MLJ 612, CA (refd)

Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209, FC (refd)

A *The United States of America v Menteri Sumber Manusia & Ors and another appeal* [2022] 4 MLJ 589, FC (refd)
Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529, CA (refd)

B **Legislation referred to**

Courts of Judicature Act 1964 s 23
Federal Constitution art 10, 10(1)(a)
Protection from Online Falsehoods and Manipulation Act 2019 [SG] ss 11, 15
C State Immunity Act 1978 [UK] s 2(1)

Appeal from: *LFL Sdn Bhd v Jabatan Peguam Negara and another appeal* [2024] 6 MLJ 806 (Court of Appeal, Putrajaya)

D *Shamsul Bolhassan (with Liew Horng Bin) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.*
Gurdial Singh Nijar (with Latheefa Koya, Shahid Adli, and Abraham Au) (Daim & Gamany) for the respondent.

E **Nallini Pathmanathan FCJ:**

INTRODUCTION

F **[1]** These appeals concern the concepts of sovereign or State immunity and extra territoriality under international law. The issues which emerge for consideration by this court essentially relate to:

(a) whether an impugned act by the Minister of a foreign State amounts to a public act attracting State immunity; and

G (b) whether State immunity may be relied upon as a defence when there is a dispute as to the extra territorial nature of a foreign statute.

THE SALIENT FACTS

H **[2]** The appellant in Civil Appeal No 01(i)-17–05 of 2023(W) is the Government of Malaysia. The appellant in Civil Appeal No 01(i)-16–05 of 2023(W) is the Attorney General of Malaysia.

I **[3]** The respondent for both appeals are Lawyers for Liberty, a Malaysian non-governmental organisation ('NGO').

[4] The facts giving rise to these appeals are as follows:

(a) on 16 January 2020, the respondent published a press statement on their

website alleging that the method of execution of the death penalty in Singapore was unlawful and brutal ('LFL press statement'); and

(b) the Government of Singapore directed the issuance of a correction direction dated 22 January 2020 ('the correction direction') to the respondent under s 11 of the Protection from Online Falsehoods and Manipulation Act 2019 ('the POFMA'), notifying the respondent that:

(i) the LFL press statement contained false statements of fact;

(ii) Singapore's Minister of Home Affairs ('the Minister'), in exercise of his statutory powers under POFMA, directed the respondent to insert a correction notice ('correction direction') not later than 23 January 2020 and failure to comply with the correction direction, without reasonable excuse, would amount to an offence under s 15 of the POFMA;

(iii) the respondent could apply to the Minister to vary or cancel the correction direction; and

(iv) in the event the application for variation or cancellation was refused, the respondent could appeal to the High Court of Singapore to set aside the correction direction.

[5] The respondent did not comply with the correction direction and, instead proceeded to file the two applications in the High Court, by way of originating summonses ('OS'), namely OS 46 and OS 51.

[6] In OS 46 against the Government of Malaysia, the respondent sought the following reliefs:

(a) a declaration that the respondent has the right to express their opinion in Malaysia with regard to any matters, pursuant to art 10(1)(a) of the Federal Constitution;

(b) a declaration that the respondent's rights could not be impaired by a law in Singapore, namely the POFMA, which purports to extend beyond Singapore, that is assuming extra-territorial jurisdiction; and

(c) a declaration that the respondent could not be subjected to any process within Malaysia in furtherance of the Singapore law.

[7] In OS 51, against the Singapore Home Affairs Minister, the respondent sought the following reliefs:

(a) a declaration that the direction issued by the Singapore Home Affairs Minister could not be enforced against the respondent in Malaysia;

(b) a declaration that the Singapore Home Affairs Minister, or anyone acting

under his authority, could not take any action to enforce any provision of the POFMA against the respondent within Malaysia; and

(c) an injunction to restrain the Singapore Home Affairs Minister, his servant or agents or anyone acting under his direction from enforcing Singapore's laws, in particular the POFMA, or taking any action related thereto, within Malaysia against the respondent.

[8] Vide an order dated 23 December 2020, the Attorney General of Malaysia was granted leave to intervene in OS 51. The Government of Malaysia, as the defendant in OS 46, and the Attorney General of Malaysia, as the intervener in OS 51, applied to strike out the plaintiff's OS on the grounds that they were scandalous, vexatious and frivolous and otherwise an abuse of the process of court.

PROCEEDINGS AT THE COURTS BELOW

[9] The High Court allowed the Government of Malaysia and Attorney General of Malaysia's applications to strike out OS 46 and OS 51 with no order as to cost.

[10] Aggrieved with the decision of the High Court, the plaintiff appealed to the Court of Appeal, which allowed both the plaintiff's appeals.

[11] The Court of Appeal set aside the decision of the High Court which struck out both of the plaintiff's OS 46 and OS 51. The Court of Appeal further ordered for OS 46 and OS 51 to be remitted back and heard before another High Court judge.

THESE APPEALS

[12] The Attorney General and Government of Malaysia then obtained leave to appeal to the Federal Court. Appeal No 16 is by the Attorney General while Appeal No 17 is by the Government of Malaysia.

THE QUESTIONS OF LAW

[13] Both the Attorney General and Government of Malaysia obtained leave for seven questions of law which are as follows:

(a) whether in the face of the certificate issued by the Yang di-Pertuan Agong recognising a country as a foreign sovereign, the Malaysian court has the jurisdiction to ventilate on the country's foreign law?

(b) whether the Malaysian court can exercise jurisdiction when the issue of sovereign immunity over a foreign governmental act is raised?

(c) whether the Malaysian court has jurisdiction to adjudicate over the conduct of a foreign State for an act of *jure imperii*?

(d) whether the Malaysian court has jurisdiction to assess the legality of the acts of a foreign State in that state?

(e) whether a dispute on extra territoriality alone overrides immunity enjoyed by a foreign sovereign State in any civil suit which seeks to challenge the legality of a decision by that foreign sovereign State over the conduct of a local citizen/organisation affecting the affairs of the foreign sovereign?

(f) whether a foreign sovereign State no longer enjoys immunity from civil suit in the court of another State where acts of extra-territoriality are being challenged? and

(g) whether a foreign sovereign State no longer enjoys immunity from civil suit in the courts of another State where questions of right to access to court and freedom of speech are engaged?

[14] From these questions, we consider that there are two primary issues that require consideration:

(a) the application of sovereign immunity to the Singaporean Minister of Home Affairs in his exercise of a governmental function; and

(b) the extra territorial effect POFMA has in relation to a Malaysian citizen in light of art 10 of the Federal Constitution.

Our deliberations and analysis in relation to the questions of law in issue (a)

The submissions of the parties

[15] The appellants assert that the Court of Appeal erred when it failed to appreciate that the plea of immunity is a procedural plea independent of the question of extra-territorial reach of a foreign law domestically. They submit that the impugned act of the Singaporean Minister of Home Affairs was an act of a sovereign State in exercise of a sovereign which attracted State immunity, and this was a threshold question which the Court of Appeal should have considered instead of wrongly remitting the matter back to the High Court to be heard on the merits.

[16] The appellants further submit that the certificate issued by the Ministry of Foreign Affairs and the statement of the Attorney General adduced in court (through an affidavit) on the status of immunity of the Singaporean Minister of Home Affairs was conclusive under customary international law, and that the Court of Appeal in disregarding the executive government's stand on the

question of foreign immunity has encroached upon a matter of foreign policy which has led to a potential breach by Malaysia of its obligation under international law.

[17] The respondent on the other hand submits that the court will assume jurisdiction where any immunity claimed by a sovereign State is incompatible with the exercise of fundamental rights, in reliance on United Kingdom Supreme Court case of *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening); Janah v Libya (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2019] AC 777, and the local cases of *Subramaniam a/l Letchimanan v The United States of America and another appeal* [2021] 5 MLJ 612 and *The United States of America v Menteri Sumber Manusia & Ors and another appeal* [2022] 4 MLJ 589. According to the respondent, immunity to a foreign State may be denied if it violates fundamental rights and access to justice.

[18] The appellants' reply to this is that the UK Supreme Court in *Benkharbouche* has made it abundantly clear that a claim for immunity was unjustified in disputes arising from employment contracts (at [76]), but otherwise, 'a claim to State immunity which is justified in international law, would be an answer' (at [77]).

Jurisdiction in international law

[19] Jurisdiction is 'the extent of each *state's* right to regulate conduct or the consequences of events' which is 'limited by the equal rights and sovereignty of other States' (see: Fox and Webb, *The Law of State Immunity* (Oxford University Press, 2013) 75 citing Jennings and Watts (eds), *Oppenheim's International Law* (9th Ed, 1992), 456; C Staker, *'Jurisdiction'* in Evans (ed), International Law (2014, 4th Ed) Ch 4; and Milanovic, *Extraterritorial Application of Human Right Treaties: Law, Principles, and Policy* (2011)).

[20] 'Jurisdiction' in 'international law' is not a single concept. The different components of a state's jurisdiction are prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction (*Hape v R* [2007] SCJ No 26; [2007] 22 BHRC 585 (SC) at [57]–[65]). According to the Restatement (Third) of the Foreign Relations Law of the United States:

(a) prescriptive jurisdiction refers to a country's ability to make its law applicable to persons, conduct, relations, or interests;

(b) adjudicative jurisdiction refers to a country's ability to subject persons or things to the process of its courts or administrative tribunals; and

(c) enforcement jurisdiction refers to a country's ability to induce or compel

compliance or to punish non-compliance with its laws or regulations.

(See: Am Soc'y Int'l L, *Jurisdictional, Preliminary, and Procedural Concerns*, in Benchbook on International Law § II.A (Diane Marie Amann ed, 2014), available at www.asil.org/benchbook/jurisdiction.pdf)

[21] There are those who, particularly in a criminal context, do not see the need to distinguish between adjudicative and enforcement jurisdiction. O'Keefe for instance explains that adjudicative jurisdiction simply describes the application of a state's criminal law by its criminal courts; in other words, adjudicative jurisdiction is simply the actualisation of prescriptive jurisdiction.

(See: O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, Journal of International Criminal Justice, Vol 2, Issue 3, September 2004, pp 735–760.)

[22] In any case, this disagreement, particularly for the purposes of our present case, is academic and does not require final resolution.

State immunity

[23] It is a basic principle of both public and private international law that a foreign State is immune from the jurisdiction of another State. Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at p 555 (CA) cited this 'classic restatement' by Lord Atkin:

> [T]he courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages.

[24] In customary international law (while the United Nations Convention on the Jurisdictional Immunities of States and their Property 2004 (UNCSI) is not yet in force, the authority for State immunity is grounded in customary international law), a foreign State is immune from claims based on sovereign or governmental acts, ie, *jure imperii* (*Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening); Janah v Libya (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2019] AC 777 at [53]. It is not disputed by the respondent that the issuance of the correction direction is not such as act (encl 24, appellant's written submissions)). *Jure imperii* refers to 'the public acts that a country undertakes as a sovereign state, for which the sovereign is usually immune from suit or liability in a foreign country' (*Black's Law Dictionary* (11th Ed)).

[25] State or sovereign immunity is a jurisdictional immunity ie immunity from legal or judicial process. Jurisdictional immunity 'is essentially procedural in nature' (*Democratic Republic of Congo v Belgium* 2002 ICJ Rep 25 at [60]) and 'is entirely distinct from the substantive law which determines whether the conduct is lawful or unlawful' (*Germany v Italy: Greece Intervening, Judgment* 2012 ICJ Rep 99 at [58]). The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on national courts' power to determine rights (*McElhinney v Ireland* (2001) 34 EHRR 323; (2001) 12 BHRC 114 at [25]).

[26] As such, a national court should address immunity as a threshold matter before it can apply any other rule of law (*NYSA-ILA Pension Trust Fund ex rel Bowers v Garuda Indonesia* 7 F3d 35, 39 (2d Cir 1993)). In other words, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. Once satisfied that the defendant is a foreign State, the forum court will dismiss the proceedings, unless satisfied that the foreign State has waived its immunity or that the proceedings fall within an exception to State immunity. In the common law, and as enacted by statute in s 2(1) of the State Immunity Act 1978 ('the SIA'), English law requires the court to give effect to immunity even though the State does not appear (*The Law of State Immunity*, Hazel Fox CMG QC et al (3rd Ed, Oxford), at p 12).

[27] A trial court's denial of a claim of immunity is an immediately appealable collateral order (*Cohen v Beneficial Indus Loan Corp* 337 US 541 (1949)). As immunity is a threshold issue that goes to a court's subject matter jurisdiction, the standard of review (by the appellate court) is *de novo* (*Cassirer v Kingdom of Spain* 616 F 3d 1019 (2010)). 'The point of immunity is to protect a foreign State that is entitled to it, from being subjected to the jurisdiction of courts in a national court, protection which would be meaningless were the foreign State forced to wait until the action is resolved on the merits to vindicate its rights not to be in court at all' (*Cassirer* at p 1025).

[28] In the *ICJ Jurisdictional Immunities* case, Germany complained at the International Court of Justice that Italy was in breach of international law by reason of the Italian courts' denial of immunity to Germany in proceedings relating to war damage caused by German armed forces in 1943–1945. Germany alleged that this breach by Italy related to the denial of German immunity from adjudication by the Italian courts as well as the denial of German immunity from enforcement by orders of the Italian court enforcing judgments of Italian and Greek courts in respect of German government property in Italy. Italy responded by supporting her claim with three strands of argument: first, that there is no immunity in international law when a State has

committed serious violations of international humanitarian law amounting to war crimes and crimes against humanity; secondly, that there is no State immunity for violations of norms of jus cogens character; thirdly, that the denial of immunity is justified because all other attempts to obtain reparations for the victims had failed.

[29] The ICJ in deciding against Italy's claim, dismissed all three arguments and further rejected Italy's contention that the combined effect of the three strands of argument justified an exception to State immunity. In doing so, the ICJ based its reasoning on the straightforward exclusionary proposition that the plea of immunity was a procedural plea independent of the issues raised in the Italian claim relating to State responsibility and their determination. The court stated:

> The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.

(*The Law of State Immunity*, Hazel Fox CMG QC et al (3rd Ed, Oxford) at pp 36–37.)

[30] It is necessary to note at this juncture that there has been recent State practice to suggest it is possible that violations of jus cogens norms constitute an exception to State immunity. In particular, courts that have found such an exception often rely on constitutional safeguards of a victim's right to access courts. There is no tenable allegation in the present case that the conduct being complained of violates norms of a jus cogens nature. As such, we express no opinion here as to the applicability of this exception in Malaysian law.

(South Korea, Seoul Central District Court (Joint Case No 2016/505092) 34th Civil Division, Judgment (8 January 2021); Brazil, Federal Supreme Court (Supremo Tribunal Federal), Recurso Extraordinario com Agravo 954.858 Rio de Janeiro.)

[31] In Malaysia, States generally enjoy immunity from the jurisdiction of foreign courts unless a matter falls within exceptional circumstances. Most of these circumstances are set out in articles 7–18 of the United Nations Convention on the Jurisdictional Immunities of States and their Property 2004 ('UNCSI') (the UNCSI has yet to take effect as treaty law as of 21 June 2024 because it has not met the requisite 30 ratifications to bring it into force (article 30) but it is the first authoritative written text of the international law of State immunity and cited in Hamid, *Public International Law, A Practical Approach* (Sweet & Maxwell Asia, 2011) 159. See also the United Nations

Treaty Collection website https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en accessed 21st June 2024):

Article 7

States are not immune to proceedings in respect of which it has submitted to the jurisdiction of Malaysia;

Article 10

States are not immune to proceedings relating to (a) a commercial transaction entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in Malaysia;

Article 11

States are not immune to proceedings relating to a contract of employment between the State and an individual where the contract was made in Malaysia or the work is to be wholly or partly performed in Malaysia, unless (a) at the time when the proceedings are brought the individual is a national of the State, or (b) at the time when the contract was made the individual was neither a national of Malaysia nor habitually resident there, or (c) the parties to the contract have otherwise agreed in writing;

Article 12

States are not immune to proceedings in respect of (a) death or personal injury or (b) damage to or loss of tangible property, in each case where it was caused by an act or omission in Malaysia;

Article 13

States are not immune to proceedings relating to any interest of the State in, or its possession or use of, immovable property in Malaysia, or any obligation of the State arising therefrom;

Article 13

States are not immune to proceedings relating to an interest arising by way of succession, gift or bona vacantia in movable or immovable property, nor does any interest of a State in property prevent the exercise of any jurisdiction relating to the estates of the deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts;

Article 14

States are not immune to proceedings relating to:

a. any patent, trademark, design or plant breeders' rights belonging to the State, and registered or protected in Malaysia or for which the State has applied in Malaysia;

b. an alleged infringement by the State in Malaysia of any patent, trade mark, design, plant breeders' rights or copyright; or

c. the right to use a trade or business name in Malaysia.

Article 15

States are not immune to proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which (a) has members other than States, and (b) is incorporated or constituted under the law of Malaysia or is controlled from or has its principal place of business in Malaysia, being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners, unless provision to the contrary has been made by agreement in writing or by the instrument establishing the body or partnership.

Article 16

In admiralty proceedings (or proceedings on any claim which could be made the subject of admiralty proceedings) a State is not immune in respect to:

a. an action in rem against a ship belonging to that State, or an action in personam for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes; or

b. an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use for commercial purposes.

Article 17

Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, it is not immune to proceedings in the courts of Malaysia which relate to the arbitration, except (a) where contrary provision is made or (b) where the arbitration agreement is between States.

(Dicey, AV, *Dicey, Morris & Collins on the Conflict of Laws* (first published in 1896, Sweet & Maxwell, 2023) 357–369.)

State immunity as a preliminary issue

[32] In the ICJ Advisory Opinion on 29 April 1999 in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of The Commission on Human Rights* [1999] ICJ Rep 62 ('Re Param Cumaraswamy'), the ICJ held that the Malaysian courts had violated international law by failing to consider Dato' Param Cumaraswamy's immunity status in a summary fashion. The ICJ made the following observation:

63. Section 22(b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. *By necessary implication, questions of immunity are therefore preliminary*

issues which must be expeditiously decided in limine litis. This is a generally recognised principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule in limine litis on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22(b). Moreover, costs were taxed to Mr Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

[33] The ICJ Advisory Opinion, indeed on this specific ground, was referred to and applied by this court in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209. It is worth reproducing in full the court's reasoning on this point:

> [72] With respect, what had escaped the attention of learned SFC was the fact that the matter of Dato' Param Cumaraswamy was eventually brought to the International Court of Justice ('ICJ') for an Advisory Opinion through a resolution passed by the United Nations Economic and Social Council which was communicated to the ICJ by way of a note from the UNSG. The ICJ considered written statements from numerous sources namely the UNSG, Costa Rica, Germany, Greece, Italy, Malaysia, Sweden, the United Kingdom and the United States of America. The ICJ eventually delivered its Advisory Opinion on 29 April 1999 in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of The Commission on Human Rights* [1999] ICJ Rep 62 ('Re Param Cumaraswamy').
>
> [73] Most importantly, the Advisory Opinion reflects that the ICJ:
>
> > 2. *Calls upon* the Government of Malaysia to ensure that all judgements and proceedings in this matter in the *Malaysian courts* are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.
>
> [74] With that firmly in mind, this Court was minded to pay due regard to the Advisory Opinion of the ICJ. Substantively, the ICJ held that the Malaysian courts had essentially violated international law by failing to consider Dato' Param Cumaraswamy's immunity status in a summary manner. The ICJ made the following observation:
>
> > 63. Section 22(b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognised principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22(b). Moreover, costs were taxed to Mr Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a

State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

[75] In our view, the judgment of the ICJ is correct and in light of it, *MBf Capital* cannot, with respect, be sustained as representing the current State of the law. It and any authorities which followed it or decided along similar lines are in the same vein no longer good law.

[76] In every case where immunity is claimed, certificates produced by the relevant authorities (especially the UNSG or other international bodies) are conclusive of that fact. If immunity is absolute (*ratione personae*) the production of the certificates would be the end of the matter. If the immunity is *ratione materiae* (functional) then affidavit evidence (which the court should presume to be true) should be considered in *limine litis* to ascertain whether the conduct or omission of the official in question was within the scope of his functions. If they were, then they are cloaked with immunity.

[77] In any event, we did not think that it is sound judicial policy to suggest that functional immunity can be determined at trial or be treated as a 'statutory defence' because doing so would be to defeat the very purpose of immunity. The trial process and interlocutory processes such as discovery (in civil cases) have the effect of sidestepping the inviolability of archives and documents and hence defeat the purposes of immunity or in this appeal, the very legislative intent of Act 485. In our considered view, this is a complete answer to the otherwise legally unsustainable suggestion that the appellant's immunity can and ought to be determined at trial in the criminal court or that his immunity ought to be treated as a 'statutory defence'.

[34] It is therefore clear that the question of whether State immunity is applicable to the present proceedings must be determined as a preliminary issue and not later.

The certificate by the Ministry of Foreign Affairs

[35] In *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475; [1990] 1 CLJ Rep 77 Gunn Chit Tuan SCJ stated that:

In applying the doctrine of sovereign immunity our courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang di-Pertuan Agong has recognised the Commonwealth of Australia as a foreign state.

[36] More recently, the UK Supreme Court in *Deutsche Bank AG London Branch v Receivers Appointed by the Court; Central Bank of Venezuela v Governor and Company of the Bank of England and others* [2022] 2 WLR 167; [2021] UKSC 57 has held:

69. As the conduct of foreign relations is entrusted to the executive branch of

government, this is a field where the judiciary must normally defer to the executive which alone is competent to determine foreign policy. This is embodied in the 'one voice principle' which finds its classic formulation in the speech of Lord Atkin in *The Government of the Republic of Spain v SS 'Arantzazu Mendi'* [1939] AC 256, 264:

> Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of states: and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.

As a result, courts in this jurisdiction accept as conclusive statements made by the executive relating to certain questions of fact in the field of international affairs. These questions include the sovereign status of a State or government and whether an individual is to be regarded as a head of State (*Mighell v Sultan of Johore* [1894] 1 QB 149; *Carr v Fracis Times & Co* [1902] AC 176).

[37] In the instant appeals, the sovereign status of the Singaporean Minister for Home Affairs can be evinced from the certificate issued and produced by the Government of Malaysia. Based on our discussion above, it is evident that the issuance of a certificate from the Government of Malaysia amounts to conclusive evidence of a foreign state's sovereign status, which means that a foreign state, a head of state, or head of government acting in an official capacity shall enjoy immunity from the jurisdiction of the local courts. Accordingly, no proceedings may be instituted against them by any party (subject to the waiver of immunity and other exceptions).

[38] In this case it is clear that the relevant acts complained of are public acts of a sovereign State in relation to its governmental function. In other words, the Singaporean Minister of Foreign Affairs is acting in his official capacity when committing the conduct complained of and therefore there can be no dispute that this attracts State immunity. As alluded to earlier, the exceptions under the restricted immunity regime largely encompass commercial, employment and other such exceptions; exceptions which are plainly inapplicable here. To that extent we are unable to exercise any adjudicative jurisdiction over the acts of a sovereign nation which includes the act of the Home Minister of Singapore.

[39] Appeal No 16 pivots on these aspects of State or sovereign immunity and therefore ought not be the subject matter of adjudication by the Malaysian courts. The Court of Appeal erred in failing to address the existence of the certificate certifying Singapore as a sovereign State and in failing to treat State immunity as a threshold issue. Insofar as Appeal No 16 and OS 51 is concerned, it is not open to the Malaysian courts to examine the merits of the suit.

[40] In the result we are of the unanimous view that Appeal No 16 is allowed and the OS is struck out.

Our deliberations and analysis in relation to the questions of law in issue (b)

The submissions of the parties

[41] The appellants submit that the extra territorial application of POFMA over the LFL statement published by the respondent is not objectionable at all since the exercise of the prescriptive jurisdiction by the Singaporean Legislature was more than justified by the objective territorial principle and the effects doctrine, as amply supported by the prevailing practice under customary international law.

[42] It is also submitted by the appellants that since there is 'widespread, representative and consistent practice' under customary international law that the existence of a right of access to court to ventilate a civil claim for violation of human rights is not a recognised exception for which a foreign State is disentitled to enjoy immunity from civil suit in the courts of another state, the case for the respondent in the present appeal is plainly unsustainable.

[43] The respondent on the other hand argues that the question of State immunity does not arise as Appeal No 17 does not involve the Singaporean government.

Extra territoriality

[44] Extra territoriality connotes the exercise of jurisdiction, or legal power, outside territorial borders (see: Colangelo, Anthony J, *What is Extraterritorial Jurisdiction?* (17 April 2014). Cornell Law Review, Vol 99, No 6, 2014, SMU Dedman School of Law Legal Studies Research Paper No 131, available at SSRN: https://ssrn.com/abstract=2363695). The question of what 'extra territorial' means, requires a fact-dependent, fundamentally legal determination that turns on the particular type of jurisdiction in issue (see: Colangelo, op cit, at 1305).

[45] The High Court struck out OS 46 as it was of the view that the respondent's suit called for the court to determine the validity of the Singaporean Minister for Home Affairs' action against the respondent under POFMA. The High Court held that it lacked the requisite jurisdiction under s 23 of the Courts of Judicature Act 1964 to adjudicate on the validity of POFMA. The High Court further held that issuance of the certificate recognising Singapore as a foreign sovereign was conclusive evidence of Singapore's immunity and that such recognition barred the High Court from

exercising jurisdiction to further inquire into the respondent's complaints.

[46] The Court of Appeal took a diametrically opposite view, holding that the respondent was not asking the court to assess the validity of the POFMA, but was instead challenging the extent of its application to a citizen or entity of this country, lawfully exercising within Malaysia his right to freedom of speech as enshrined and guaranteed by the Federal Constitution. The Court of Appeal held that the High Court failed to address the issue of the applicability of the principle of comity of nations as regards the extra territorial effect of a national law. The Court of Appeal disagreed that OS 46 disclosed no reasonable cause of action and remitted the matter back to the High Court.

The law on striking out

[47] The domestic law relating to striking out is trite (see: *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 and *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1). In these cases, the subject matter of the applications usually relates to the need for the parties to ventilate evidence in full before arriving at a final decision, as a consequence of which the option of striking out becomes untenable. In other words, these applications are related to the requirement for further evidence at trial.

[48] However, the present appeal relates to public international law, where the legal concepts, procedure and considerations differ from the issues arising in domestic case law. There is a dearth of case law relating to striking out in relation to public international law. We therefore turn to international case law to ascertain the principles that comprise the basis for striking out.

[49] The core issue that necessitates examination in the present appeal is: can Singapore exercise its prescriptive jurisdiction over Malaysian citizens committing acts within Malaysia? The answer, to our minds, is that it would depend on the circumstances obtaining before the court.

[50] The case of *SS Lotus (France v Turkey)* (1927) PCIJ Series A, No 10 is frequently cited as authority for the proposition that, with respect to prescriptive jurisdiction, states can exercise the said jurisdiction provided there is no prohibitive rule to the contrary:

> *the first and foremost restriction imposed by international law on a State is that* — failing the existence of a permissive rule to the contrary — *it may not exercise its power in any form in the territory of another state. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.* Such a view would only be

tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed states to do so in certain specific cases. *But this is certainly not the case under international law as it stands at the present. Far from laying down a general prohibition that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.*

[51] This proposition has been vehemently criticised (see for instance FA Mann, *The Doctrine of Jurisdiction in International Law*, (1964-I) 111 RCADI 1, 36; ICJ, *Arrest Warrant (Democratic Republic of Congo v Belgium)* ICJ Rep 3 (2002), dissenting opinion of Judge Van Den Wyngaert, [51]).

[52] The modern approach to territoriality in international law is well encapsulated as follows: 'if a State wishes to project its prescriptive jurisdiction extraterritorially, it must find a *recognised basis in international law* for doing so' (*Regina v Gul (Mohammed)* [2014] AC 1260 (SC) at [58]).

(*Brownlie's Principles of Public International Law* (8th Ed, 2012), p 458.)

[53] On what amounts to *'recognised basis in international law',* it has been held that extra-territorial prescriptive jurisdiction is usually only exercised *'where a real and substantial link with the State is evident'* (*Hape v R* [2007] SCJ No 26; [2007] 22 BHRC 585 (SC) at [64]).

[54] One of these recognised bases in international law include, for instance, the passive personality principle; this is where jurisdiction is exercised on the basis of harm to a national abroad.

(See Judges Higgins, Koojimans and Buergenthal at [47] in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* International Court of Justice, 14 February 2002 ('Arrest Warrant'); see also the Separate Opinion of President Guillaume at [5] in *Arrest Warrant*.)

[55] With respect to the specific 'recognised basis' that the appellants rely on, that is the 'effects doctrine', it must be noted that such a doctrine is used primarily in antitrust cases (Cedric Ryngaert, *Jurisdiction in International Law* (2nd Ed), Chapter 3, pp 82–84). While this does not act as a complete bar to the effects doctrine being utilised in analogous situations, it does mean that caution must be exercised against an overbroad application of this exception to

A the norm that prescriptive jurisdiction is meant to be exercised within one's own territory.

[56] What can be distilled from the above is that while there is no absolute prohibition on states extending the reach of their local laws beyond the borders B of their territory, an extra territorial expansion of a state's prescriptive jurisdiction must first be predicated upon a recognised basis in international law. This in turn involves consideration of whether there is an obviously substantial link with the State seeking to enact laws with extra territorial effects.

C

[57] We note that in the appellant's own joint reply submissions, it is acknowledged that:

> Even under an expanded view of jurisdiction, however, *a nation can only exercise jurisdiction to prescribe when the exercise of such jurisdiction is reasonable. Whether the* D *exercise of jurisdiction to prescribe is reasonable or not should be determined by considering various factors*, such as the strength of the link of the activity to the territory of the regulating state, the importance of regulation to the regulating State … *Reasonableness is also required for jurisdiction to adjudicate: nations only have authority to exercise adjudicatory (jurisdiction) through their courts if the relationship* E *between the nation and the person or thing that is the object of the adjudicative effort is sufficiently close.* Factors to take into account include whether the suspect is present or domiciled in the territory of the state, and whether the person has carried on outside the State an activity having a substantial, direct, and foreseeable effect within the state' (*Cybercrime and Jurisdiction: A Global Survey*, edited by Bert-Jaap F Koops and Susan W Brenner, TMC Asser Press (2006), pp 4–6).

[58] It is clear therefore that the question of whether Singapore possesses the necessary jurisdiction to prescribe in this instance involves an evaluation of multiple factors, such that this issue cannot be decided summarily for the G purposes of striking out.

[59] In light of the above, we unanimously dismiss Appeal No 17. We therefore order the OS to proceed for hearing but only in respect of the relief sought in prayers 1 and 2 as amended to read as follows:

H

> a declaration as to the extra territorial jurisdiction of POFMA in relation to a Malaysian citizen in Malaysia in light of art 10(1)(a) of the FC.

[60] Prayer 3 is disallowed in that it encroaches on State immunity.

I

[61] We reiterate that the determination of OS 51 in the High Court is purely on questions of law, ie on the extra territorial effect of POFMA. Extra territoriality is the main subject matter of OS 51. As amended, it does not encroach into State or sovereign immunity but involves only Malaysian parties

over which our courts enjoy jurisdiction. It also entails construction of the Federal Constitution.

[62] The respondent expressed concern and sought clarification on the extent of their rights of freedom of expression under art 10(1)(a) of the Federal Constitution in relation to statements made in Malaysia which are the subject matter of foreign legislation, namely POFMA. This in effect amounts to an issue relating to the extra territorial jurisdiction of POFMA and its compatibility with the supreme law of our land: the Federal Constitution. This, in our view is not obviously and plainly unsustainable. This is all the more so, in light of our amendments to the relief sought in OS 51.

[63] Given the foregoing, we decline to answer the leave questions.

[64] We make no order as to costs.

Appeal 16 allowed and Appeal 17 dismissed.

Reported by Nabilah Syahida Abdullah Salleh